IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

STATE OF TENNESSEE, *ex rel.* ROBERT E. COOPER, JR., ATTORNEY GENERAL,	)	
	)	No. 3:07-cv-0988
Plaintiff,	)	
	)	JURY DEMAND
v.	)	Judge Wiseman
BRITLEE, INC., et al.,	)	Magistrate Judge Griffin
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND TO STATE COURT

I. SUMMARY OF ARGUMENT

Plaintiff, State of Tennessee, ("State") respectfully submits this Memorandum of Law in Support of its Motion to Remand to State Court. Remand is appropriate because defendants have failed to carry their burden of demonstrating that this case presents a "federal question" or "arises under" the laws of the United States. This is defendants' second attempt to remove this case to federal court and merely presents a variation of the same argument this Court previously considered and rejected. This case was removed for the purpose of avoiding or delaying contempt proceedings currently pending against removing defendant Rome Finance Company, Inc.

The State further submits that because the second Notice of Removal lacks merit and was brought for an improper purpose, costs and attorneys' fees should be awarded to the

State.

II. STANDARD FOR REMOVAL AND REMAND

The standards for removal and remand are well known to this Court. Federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331; *Gully v. First Nat'l Bank of Meridian*, 299 U.S. 109, 112 (1936); *State of Tenn. v. Britlee, Inc., et al.*, No. 3:05-0846, slip op. at 2 (M.D. Tenn. Jan. 3, 2006);[1] *Glovier v. Barton Homes, LLC*, 452 F. Supp. 2d 657, 659 (W.D. La. 2006). Defendant Rome Finance Company, Inc. ("Rome") argues this case "arises under" the laws of the United States because several sentences in the State's Second Amended Complaint indirectly refer to two Federal Trade Commission regulations, 16 C.F.R. § 233 and 16 C.F.R. § 251.1.[2] This is the second time removing defendants incorrectly claim that the incorporation of federal terms of art into a state statute somehow confers jurisdiction on this Court. *See Britlee* slip op. at 3 ("[T]his incorporation of some federal terms into a state statute does not serve to confer original jurisdiction upon the federal courts.") *See* Ex. A.

The presence or absence of "arising under" or "federal question" jurisdiction is

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[1] A copy of this Court's opinion in *State of Tenn. v. Britlee, Inc., et al.*, No. 3:05-0846, slip op. (M.D. Tenn. January 3, 2006) is attached as Ex. A.

[2] Paragraphs 78 - 82 and 101 of the State's Second Amended Complaint contain these references. 16 C.F.R. § 233 is commonly known as the FTC Holder Rule and 16 C.F.R. § 251.1 defines the meaning of the term "free." Neither regulation can be directly enforced by a state; rather, both regulations are enforced by the FTC. *Id.*

governed by the well-pleaded complaint rule. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Glovier*, 452 F. Supp. 2d at 659. In order to determine whether "arising under" or "federal question" jurisdiction exists, the court looks to the allegations of plaintiff's complaint. *Gully*, 299 U.S. at 112; *State of Tennessee v. Britlee*, slip op. at 2. The federal question "must be disclosed upon the face of the complaint, unaided by the answer." *Gully*, 299 U.S. at 113.

It takes more than a federal element, however, to provide jurisdiction over a claim. *Empire Healthchoice Assur., Inc. v. McVeigh*, 1265 S.Ct. 2121, 2137 (2006); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005); *Glovier*, 452 F. Supp. 2d at 659. The right or immunity created by the Constitution or laws of the United States must be an *essential element* of the plaintiff's cause of action. *Gully*, 299 U.S. at 113. The possibility or even likelihood that a state court would have to interpret or apply some federal law during a case does not convert the state law claims to federal ones or otherwise support federal question jurisdiction. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808-09 (1986); *Britlee*, slip op. at 3; *Glovier*, 452 F. Supp. 2d at 660.

Removal statutes are strictly construed and "all doubts as to propriety of removal are resolved in favor of remand." *Britlee*, slip op. at 3 (*quoting Coyne v. Am. Tobacco Co*., 183 F.3d 488, 493 (6th Cir. 1999)). *See also Union Planters Nat'l Bank v. CBS, Inc.*, 557 F.2d 84, 89 (6th Cir. 1977); *Hudgins Moving & Storage Co., Inc v. Am. Express Co.*, 292 F. Supp. 2d 991, 995-96 (M.D. Tenn. 2003) and *Benton v. Vanderbilt Univ.*, 118 F. Supp. 2d 877, 881 (M.D. Tenn. 2000).

The burden of establishing that removal was proper rests with the defendant as the

removing party. *Her Majesty the Queen v. Detroit*, 874 F.2d 332, 229 (6th Cir. 1989); *Britlee,* slip op. at 3 (Ex. A). When the party asserting federal jurisdiction finds its allegations challenged, it must submit evidence substantiating its claims. *Cmty. Ins. Co. v. Rowe*, 85 F. Supp. 2d 800, 804 (S.D. Ohio 1999) (citing *Amen v. City of Dearborn*, 532 F.2d 554, 560 (6th Cir. 1976)). The removing defendant's burden is to prove, by a preponderance of the evidence, that the jurisdictional facts it alleges are true. *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993); *Britlee,* slip op. at 3 (Ex. A).

III. FACTUAL ALLEGATIONS AND BACKGROUND

In its Second Amended Complaint, the State has alleged that since at least November 1, 2004, all defendants have engaged in various deceptive and predatory sales and lending practices in violation of state consumer protection law, primarily targeting active members of the military.[3] The State's Second Amended Complaint alleges the following:[4]

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[3] Military personnel and their families are frequent targets of predatory sales and lending practices. *See* S. Graves, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, 66 OHIO ST. L. J. 653, 831 (2005) ("For too long, civilian government has stood by while a parade of cheats and charlatans have preyed on young service members and their families."); S. Tripoli, A. Mix, *Consumer Scams and the Direct Targeting of America's Military and Veterans*, NATIONAL CONSUMER LAW CENTER, p. 3 (May 2003)("Scores of consumer-abusing businesses directly target this country's active-duty military men and women daily.")

[4] The State's Second Amended Complaint is attached as Ex. B and is hereafter referred to as "SAC."

During the immediately preceding four year period, defendant Britlee, Inc. ("Britlee"), a North Carolina corporation, has been selling laptop computers at the Governor's Square Mall in Clarksville, Tennessee. (SAC ¶ 2). Britlee initially operated under the trade name "The Military Zone" or "Military Zone," and later as "Laptoyz Computers and Electronics" (SAC ¶ 12).[5] Defendant Millennium Finance, Inc. ("Millennium"), also a North Carolina company, and defendant Rome Finance Company, Inc., ("Rome"), a California corporation, financed Britlee's sales at various times during this period. (SAC ¶¶ 3, 5). Defendant Stuart L. Jordan ("Jordan") is the owner and operator of both Britlee and Millennium and played an active and controlling role in the operations of both companies. (SAC ¶ 4). None of the defendants were registered or licensed to do business in the State of Tennessee, Montgomery County or in the City of Clarksville during this time. (SAC ¶¶ 3-5, 13-15, 24-26 and 32-33).[6]

The State alleges that the defendants targeted the young men and women who were serving in the United States Military,[7] mostly at Fort Campbell, Kentucky, a U.S. Army base

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[5] "Affinity marketing" using military-sounding names, military symbols and ex-military people in sales and executive capacities further clouds the identities and goals of many businesses military people would do better to avoid." Tripoli, *supra* note 3, at 3. Britlee later changed its trade name from "The Military Zone" to "Laptoyz Computers and Electronics."

[6] Fringe lenders frequently refuse to obtain licenses required by law. *See* Graves, *supra* note 3, at 664.

[7] Defendant Stuart Jordan, president of defendants Britlee and Millenium, has admitted

located partly in Tennessee. (SAC ¶ 6).[8] Many of these soldiers were young and unsophisticated. *Id.*[9] Members of the military must maintain their finances in good order or face significant penalties such as the loss of security clearance or dismissal from military service. *Id.*[10]

Britlee's Tennessee employees regularly asked mall customers if they were members of the military, and if the answer was yes, they would attempt to sell computers to these customers. (SAC ¶ 39).[11] Employees also advertised various financing options to the

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that Britlee's "primary customer base is comprised of active duty military personnel who want to own a laptop computer but who cannot qualify for financing through other retail vendors." *See* Jordan Aff. ¶ 2, Ex. C hereto.

[8] The great majority of military service members are young enlisted personnel; junior enlisted personnel make up about 75% of the military. *See* Graves, *supra* note 3, at 676.

[9] Enlisted militrary personnel have had historically limited educational backgrounds. Graves, *supra* note 3, at 676. Almost half of enlisted personnel list the primary motivation for joining the military as the ability to receive future assistance in obtaining an education. *Id.*

[10] The consequences of unpaid debt are severe: loss of security clearance, bar to re-enlistment, denial of promotion, court martial and dishonorable discharge. Graves, *supra* note 3, at 685-86. This, in turn, makes military members more promising targets for predatory lenders. *Id*. at 686.

[11] By making loans only to actively service members, defendants are able to avoid the provisions of the Servicemembers Civil Relief Act of 2003, 50 U.S.C. Appx. §§ 501-596 (2005). Under the Act, lenders must reduce interest rates to 6% for for military personnel that are

soldiers, including "free" financing (SAC ¶ 39), "100% Military Financing" (SAC ¶ 43), "special" programs for service members (SAC ¶44) and "low monthly payment[s]" *Id.*[12] Soldiers with bad credit or no credit were told that Britlee's financing would help establish, re-establish or repair their credit (SAC ¶ 46).[13]

One of the computers offered by Britlee was a Sony Vaio computer, which Sony sold at retail prices ranging from $900 to $2,500 (SAC ¶ 47). Britlee sold these same computers to Fort Campbell soldiers at prices ranging from $3,000 to $4,200. *Id*. Britlee kept 60% of the sales proceeds for itself and defendant Rome took the other 40%. (SAC ¶ 48).[14] Soldiers were told that the $3,000 to $4,200 price already included all finance charges and constituted

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activated. If the loan is made to an already-activated service member, the protections of the Act do not apply.

[12] Typically, junior enlisted military personnel are low wage earners. *See* Graves, *supra* note 3, at 679. In 2005, a typical Army private first class made $16,884 a year. *Id.* Military surveys reveal that nearly one-third of enlisted service members self-report moderate to severe difficulty in paying their bills. *Id*.

[13] "Military personnel are ripe targets for consumer predators because many are low-income (always the most targeted group) but have a far longer list of economically-attractive qualities than most low-income people." Tripoli, *supra* note 3 at 3. "Like all low-wage entry-level workers, military personnel tend to live month-to-month, often struggling to pay their bills." Graves, *supra* note 3, at 679.

[14] Predatory lenders do not attempt to compete by offering lower prices than their competition, but rather by extracting debts others cannot. *See* Graves, *supra* note 3, at 686.

the total amount paid. (SAC ¶ 57). Soldiers were also told that if they paid off the entire amount owed within one year of purchase, all interest paid would be refunded. (SAC ¶ 60).

Britlee also advertised a "40% discount for cash." (SAC ¶ 52). When soldiers inquired about this discount, they were told either that it was only available for civilian customers, was only a few dollars less than the financed amount, or was being advertised because Britlee was required to do so by law. (SAC ¶ 53).

The defendants ensured their receipt of future payments from the soldiers by requiring the soldiers to assign their payment allotment rights to defendants; soldiers were required to sign a "Britlee Purchase Agreement" and a "Confidential Credit Application and Credit Agreement" for either Rome or Millenium, depending on which company was financing the transaction (SAC ¶ 61-62). Among other things, the Confidential Credit Application had a statement in fine print that the purchaser was applying for an "open-end" revolving credit account and that the initial amount financed was close to the initial credit limit. (SAC ¶ 62). Soldiers also had to sign a separate letter stating they know the financing is an "open-end" account, without any definition of what that meant. (SAC [sic] ¶ 66).

Some soldiers were told monthly payments would be made through allotments from the soldiers' military payrolls while other soldiers were told that financing was only available if the soldiers agreed to a military payroll allotment. (SAC ¶ 63). Defendants then accessed the soldiers "MyPay" accounts, which is the online method soldiers use to access their military payroll accounts. *Id*. Defendants made photocopies of the soldiers' military identification cards and bank debit cards. (SAC ¶ [sic] 66). Some soldiers were told their bank accounts would be debited if the allotments stopped and other soldiers had to provide

written agreements not to stop their allotments. *Id*. Soldiers were also required to provide defendants with authorization to allow defendants to request new passwords on the soldiers' MyPay accounts. (SAC ¶ 65). Defendants also arranged for the soldiers' allotment pay to be deposited directly into an account with First Citizens Bank in Kentucky, which, in turn, was paid to defendants. (SAC ¶ 66-67).

In order to avoid certain state and federal laws, defendants Rome, Millenium and Jordan required its sellers, including Britlee, to discontinue using "retail installment contracts" and instead, use a separate sales contract and a separate retail charge agreement. (SAC ¶¶ 70-74, 80-81). Rome and Millenium also trained Britlee employees on how to qualify the soldiers for their loans, fill out the paperwork, process the applications and direct pay allotments to their bank accounts. (SAC ¶¶ 83-87). In Tennessee, certain consumer disclosures must be made in a retail installment contract whereas an open ended agreement requires fewer disclosures. (SAC ¶¶ 72-73)(*citing* Tenn. Code Ann. § 47-11-103 (2007)). Under Tennessee law, retail installment contracts must disclosure the price, identification of the goods or services, the principal balance owed and the amount of the time price differential. *Id.* In addition, 16 C.F.R. § 433, also known as the FTC Holder Rule, requires that consumer financing documents disclose that the holder, or subsequent assignee of the note (here, Rome or Millenium), is subject to the same claims and defenses as the original Seller (Britlee) (SAC ¶¶ 78-79). Most soldiers did not know or understand the significance of opening retail charge agreements and thought they were entering into a single retail installment transaction with defendants. (SAC ¶¶ 75-76).

Defendants' finance agreements also contained a so-called "choice of forum"

provision which required all litigation to take place in one particular location, such as Gwinett County, Georgia, for example. (SAC ¶ 89).[15]

IV. PROCEDURAL BACKGROUND

A. The State Court Proceedings and Defendants' First Notice of Removal

On September 23, 2005, after receiving complaints from members of the military regarding defendants' business practices, the State of Tennessee filed this civil law enforcement proceeding in the Circuit Court of Montgomery County. *See* original Compl., Ex. D. In its complaint, the State alleged that defendants engaged in various deceptive acts and practices in violation of state law, including false advertising and predatory lending in violation of the Tennessee Consumer Protection Act of 1977 ("TCPA"), Tenn. Code Ann. 47-18-101, *et seq*., and the Tennessee Credit Services Businesses Act ("TCSBA"), Tenn. Code Ann., § 47-18-1001, *et seq*. *Id*. In particular, the defendants were charged with engaging in over a dozen different types of unfair and deceptive acts and practices relating to their sale and financing practices. *Id*.

On September 23, 2005, the Circuit Court issued a temporary restraining order against all the defendants, prohibiting them from engaging in the above unlawful conduct, freezing certain assets and sealing certain sensitive consumer information. *See* T.R.O., September 23, 2005, Ex. E, hereto. This restraining order later converted into a temporary (preliminary)

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[15] Soldiers who are deployed are most vulnerable because they are least able to defend themselves in such proceedings. *Cf.* S. Tripoli, *supra* note 3, at 3 ("Periods of deployment like those for the recent war in Iraq are especially vulnerable times.")

injunction. *See* Agreed Order for a Temporary Inj., November 7, 2005 Ex. F, hereto. Certain injunctive provisions required the defendants to cease all collection activities against consumer victims and forbid defendants from taking any adverse credit reporting actions against such victims during the pendency of the proceedings. *See* Ex. F, ¶¶ 1 - 14.

On October 18, 2005, Plaintiff filed its First Amended Complaint. *See* First Amended Compl., Ex. G, hereto. The First Amended Complaint added defendant Millennium to the case. *Id*. Six days later, on October 24, 2005, Millennium removed the case to this Court with "no objection" from the other defendants. *See* first Notice of Removal, Ex. H, hereto.

On October 31, 2005, defendants filed an Answer to the State's First Amended Complaint in this Court. *See* Ex. I, hereto. Defendants denied the State's allegations and asserted numerous affirmative defenses, including alleged "compliance" with the Federal Truth in Lending Act (15 U.S.C. §§ 1601 *et seq.*)("TILA") *Id*. Defendants argued that their alleged compliance with TILA constituted an absolute defense to the State's TCPA claims. *See* Tenn. Code Ann. § 47-18-114 (2007). The defendants also argued that their alleged compliance with TILA and the related incorporation of TILA's terms into the State's case caused this case to "arise under" federal law. *Id*.

The State timely moved to remand this case back to state court. *See* State's Mot. to Remand and Mem. in Support, Ex. J and K, hereto. The matter was briefed and on January 5, 2006, this Court ordered that the case be remanded to state court. *See Britlee,* slip op. at __ (Ex. A). Notably, this Court held that the incorporation of federal terms in state statutes does not create original jurisdiction in federal courts. *Id*. at 3. Judge Trauger also ruled that compliance with the Code of Federal Regulations (specifically TILA) was a defense matter

and not an element of Plaintiff's proof. *Id.*

B. Rome's Injunction Violations and the Related Contempt Proceedings

On or about October 26, 2006, approximately one year after the temporary injunction was first entered against Rome, the State received evidence that Rome was violating the injunction by continuing to engage in collection activity and issuing negative credit reports against soldiers. *See* Mot. to Hold Defendant Rome Finance Co., Inc. in Civil Contempt of This Court's T.R.O., Ex. L, hereto and Baldwin Aff., Ex. M, hereto. The State notified Rome of these violations and Rome admitted it had violated the injunction; Rome claimed, however, that the violations occurred due to a computer error which it promised to rectify. *See* pp. 4-5, Ex. G. Based upon Rome's representations and promises, the State did not move for contempt, but instead, requested complete documentation for each consumer victim who may have been affected by Rome's injunction violations. *Id*. Rome promised the State that it would produce this information, but to date, has failed to do so.

Several months later, on January 30, 2007, the State learned of further unlawful collection activity by Rome in violation of the injunction during the deposition of a military consumer victim (Ex. G and H). The State also received complaints regarding four additional consumer victims that had been subject to post-injunction collection activity and negative credit reporting by Rome. *Id.*

On February 15, 2007, the State filed a Motion to Hold Rome Finance Co. in Civil Contempt (Ex. G). The State had also learned that Rome was more deeply involved in the deceptive conduct that originally believed, and filed a second motion to amend the complaint to add Rome to all of the allegations in the complaint. The State's Second Amended

Complaint was filed and served on September 12, 2007 (Ex. B). The Second Amended Complaint, at issue here, alleged defendants committed the following violations of state law:

(1) Falsely representing they were authorized to do business in the City of Clarksville, Montgomery County and the State of Tennessee;[16]

(2) Falsely advertising that soldiers were getting special offers, "100% Military Financing," or "free" financing;[17]

(3) Providing false or fictitious reasons for their high prices;[18]

(4) Providing false reasons for their 40% off cash discounts and their availability to the military;[19]

(5) Failing to disclose that Rome, Millenium and/or Jordan were not offering separate credit agreements, but were purchasing Britlee's sales contracts at a discount;[20]

(6) Failing to disclose that consumers had the same rights and defenses

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[16] In violation of Tenn. Code Ann. §§ 104(a), (b)(2), (b)(3), (b)(5), (b)(7) and (b)(27) (SAC ¶¶ 106-07, 123-27 and 130).

[17] In violation of Tenn. Code Ann. §§ 104(a), (b)(3), (b)(5), (b)(7) and (b)(27) (SAC §¶ 108-09).

[18] In violation of Tenn. Code Ann. §§ 104(a), (b)(5), (b)(7) and (b)(27) (SAC ¶¶ 110-11).

[19] In violation of Tenn. Code Ann. §§ 104(a), (b)(5), (b)(12) and (b)(27) (SAC ¶¶ 112-13).

[20] In violation of Tenn. Code Ann. §§ 104(a), (b)(5), (b)(9), (b)(11), (b)(12), (b)(22) and (b)(27) (SAC ¶ 114).

against Rome and Millenium as they did against Britlee and Jordan;[21]

(7) Falsely representing that the purchase price included all interest;[22]

(8) Using illegal disclaimers of liability in their contracts;[23]

(9) Falsely designating their financing as a retail charge agreement (open-end) when, in fact, it was closed end;[24]

(10) Imposing unlawful and onerous choice of law and jurisdictional provisions;[25]

(11) Falsely representing and failing to rebuild credit as promised;[26]

(12) Failing to accept returns of goods and issue refunds as promised;[27]

(13) Failing to provide the required credit services notice of cancellation;[28]

(14) Collecting or attempting to collect on purchase paper defendants knew

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[21] As required by 16 C.F.R. § 433 and therefore in violation of Tenn. Code Ann. §§ 104(a), (b)(5), (b)(7) and (b)(27) (SAC ¶ 115).

[22] In violation of Tenn. Code Ann. §§ 104(a), (b)(5), (b)(12) and (b)(27) (SAC ¶ 117).

[23] In violation of Tenn. Code Ann. § 47-18-113(a) and also §§ 47-18-104(a), (b)(5), (b)(12) and (b)(27) (SAC ¶ 119).

[24] In violation of Tenn. Code Ann. §§ 47-18-104(a), (b)(7) and (b)(27) (SAC ¶ 120).

[25] In violation of Tenn. Code Ann. § 47-18-113(b) and §§ 47-18-101(a), 104(a), (b)(5), (b)(12) and (b)(27) (SAC ¶¶ 121-22 and 132).

[26] In violation of Tenn. Code Ann. § 104(a), (b)(5), (b)(12) and (b)(27) (SAC ¶ 133).

[27] In violation of Tenn. Code Ann. § 47-18-104(a) and 1007(b) (SAC ¶ 129).

[28] In violation of Tenn. Code Ann. §§ 47-18-104(a), (b)(5), (b)(7) and (b)(27) (SAC ¶ 133).

or should have known was void and unenforceable; and[29]

(15) Failing to clearly and conspicuously disclose that financing was not "free" and that 40% of the purchase price was actually a finance charge;[30]

On September 4, 2007, the Circuit Court began the evidentiary contempt proceedings against Rome. *See* Tr. of Contempt Proceedings, September 4, 2007, Ex. N. The State presented the testimony of several witnesses at that time, but because Rome had refused to produce any information in response to a subpoena issued by the State, the September 4, 2007 proceedings were adjourned and Rome was ordered to produce such information to the State by October 4, 2007. *Id*.

On October 3, 2007, one day before Rome was to produce documents and information regarding its contempt of court and the affected consumer victims, and before the contempt proceedings against it could conclude, Rome removed this case to federal court. *See* Ex. O. Notwithstanding this Court's earlier ruling in this case in *State of Tennessee v. Britlee* (Ex. A), Rome again alleged that this case 'arises under" federal law because of the

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[29] In violation of Tenn. Code Ann. § 47-18-104(a) and (b)(27) (SAC ¶ 134).

[30] Defined as a deceptive act or practice under 16 C.F.R. § 251.1 and therefore a deceptive act or practice in violation of Tenn. Code Ann. §§ 47-18-104(a) and 1004 (SAC ¶¶ 100-101, 105 and 128).

Second Amended Complaint's reference to the federal terms of art found in 16 C.F.R. § 233 and 16 C.F.R. § 251.1. Defendants claimed that such references somehow serve to confer original jurisdiction upon this Court. *See* Second Notice of Removal, Ex. O.

V. ARGUMENT

A. Defendants have failed to carry their burden of demonstrating that this case presents a "federal question" or "arises under" the laws of the United States

The issue before the Court in this proceeding is whether the State's indirect references to the FTC "Holder Rule," 16 C.F.R. § 433, and the definition of "free" in 16 C.F.R. § 251.1 in the State's consumer protection enforcement complaint, present a federal question sufficient to confer original jurisdiction upon this Court. The State respectfully submits that this case does not "arise under" federal law because it is a civil law enforcement prosecution brought *exclusively* under Tennessee state law - the Tennessee Consumer Protection Act of 1977 ("TCPA")[31] and the Tennessee Credit Services Businesses Act ("TCSBA").[32] The Law of the Case and the rulings of this Court make clear that the "incorporation of some federal terms into a state statute does not serve to confer original jurisdiction upon the federal courts." *Britlee*, slip op. at 3.

Hoping to persuade this Court that a federal issue exists, Rome couches its removal language in terms that imply the State made allegations under federal law. Rome even tells the Court that "[i]n its Second Amended Complaint, Plaintiff has alleged that Rome has violated federal law." *See* Notice of Removal, ¶ 6 (Ex. O). Not surprisingly, Rome fails to identify any specific "allegations" to this effect, but simply points to the State's references to 16 C.F.R. § 433 and 16 C.F.R. § 251 as its "evidence" that this case is federal. *Id.* A review of the State's Second Amended Complaint readily confirms that Rome's assertions are without merit.

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[31] Tenn. Code Ann. 47-18-101 (2007), *et seq*.

[32] Tenn. Code Ann., § 47-18-1001 (2007), *et seq*.

B. On Its Face, the Second Amended Complaint Does Not Present a Federal Issue

As seen on its face, the Second Amended complaint charges the defendants with violating only state law and nothing more. The main factual and legal allegations presented in the State's Second Amended Complaint were previously set forth and allege violations of the TCPA. Paragraphs 78 - 82 and 101 of the Second Amended Complaint contain the challenged references to 16 C.F.R. § 433 and 16 C.F.R. § 251.1. The text of these paragraphs provides as follows:

> 78. In practice and effect, Defendants Rome and Millennium were actually purchasing the retail installment contract from the Seller at a 40% discount, making Rome a holder in due course and subject to the provisions of 16 C.F.R. § 433.
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> 79. 16 C.F.R. § 433.2 makes it an unlawful, unfair and deceptive act or practice to accept any payment unless the consumer credit contract contains an affirmative, clear and conspicuous disclosure expressly informing the consumer that the holder in due course is subject to the same claims of defenses as the Seller.
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> 80. Defendants Rome and Millennium, to avoid having to disclose to consumers their right under 16 C.F.R. § 433 to preserve their claims and defenses requirement, would direct the sellers to provide consumers with a sales contract and a separate retail charge agreement that set up a revolving credit account that would have a credit limit of only a few dollars above what the purchase price of the goods and services sold to the consumer.
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> 81. If Rome and Millennium actually entered into a separate retail charge agreement in order to finance the purchase, then the money being loaned to the consumer could have been paid by the consumer to the seller, in cash, qualifying the consumer for the advertised "40% cash discount."
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> 82. A violation of 16 C.F.R. § 433 being an unlawful unfair and deceptive act, is a *per se* unfair and deceptive act under the Tennessee Consumer Protection Act of 1977, 47-18-101, *et seq.*
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> * * * *
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> 101. At all times relevant to the Complaint, Defendants, by not affirmatively, clearly and conspicuously disclosing to consumers that the

> "free" financing was actually costing the consumer a financing fee in an amount equal to 40% of the purchase price of the goods or services they were purchasing from Britlee, this failure to disclose being described as unfair and deceptive by 16 C.F.R. § 251.1 is therefore an unfair and deceptive act or practice in violation of Tenn. Code Ann. §§ 47-18-1049a), (b)(5), (b)(7), (b)(9) and (b)(27).

The Second Amended Complaint simply alleges that because Rome's conduct runs afoul of these FTC regulations, the same conduct constitutes violations of the TCPA and the TCSBA.

16 C.F.R. § 433, (Preservation of Consumers' Claims and Defenses), and 16 C.F.R. § 251 (Guide Concerning Use of the Word "Free" and Similar Representations) are trade regulations enforced by the Federal Trade Commission ("FTC"). 16 C.F.R. § 433, known as the FTC Holder Rule, preserves consumer claims against subsequent holders of consumer credit contracts. It does not create any federal private right of action and does not give rise to federal question jurisdiction. *See* D. Zupanec, *Federal Question Jurisdiction - FTC Holder Rule*, 22 NO. 2 FED. LIT. 8 (February 2007); *Phillips v. Lithia Motors, Inc.*, 2005 WL 1278850, n. 3 (D. Or. 2005). Further, Rome has not argued that 16 C.F.R. § 433 or 16 C.F.R. § 251 preempt the State from using these regulations as descriptions of unfair and deceptive acts or practices, and to the State's knowledge, no court has made such a ruling.

C. The TCPA Mandates Interpretation Consist With Federal Law

The Tennessee Consumer Protection Act of 1977[33] is Tennessee's version of a "Little FTC Act."[34] The model for the TCPA was developed by the Federal Trade Commission in

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[33] Tenn. Code Ann. § 47-18-101 (2007), *et seq.*

[34] "Little FTC Acts were so designated because of their similarity to the provision of the

conjunction with the Committee on Suggested State Legislation of the Council of State Governments and is patterned after Alternative # 3 of the Unfair Trade Practices and Consumer Protection Law.[35] The TCPA has two main operative provisions: §104(a) prohibits "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce,"[36] and §104(b) contains a "laundry list" of thirty-six prohibited acts and practices which constitute *per se* deception under the Act.[37]

The TCPA is a remedial statute[38] which must be "liberally construed to ... protect consumers and legitimate business enterprises from those who engage in deceptive acts or practices."[39] In enacting the TCPA, the General Assembly intended to promote the policy of "maintaining ethical standards of dealing between persons engaged in business and the consuming public to the end that good faith dealings between buyers and sellers at all levels be had in [Tennessee]."[40]

The TCPA provides for a private right of action[41] and also vests civil enforcement authority with the Attorney General and the Division of Consumer Affairs.[42] This proceeding

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Federal Trade Commission Act that outlaws unfair or deceptive trade practices." *Tucker v. Sierra Builders, Inc.*, 180 S.W.3d 109, 114 (Tenn. Ct. App. 2005).

[35] *See* Council of State Governments, 1970 Suggested State Legislation, Unfair Trade Practices and Consumer Protection Law - Revision (Vol. XXIX), Clearinghouse No. 31, 035 B. *See also* D. Pridgen, *Consumer Protection and the Law*, § 3:5 (2002).

[36] Tenn. Code Ann. § 47-18-104(a) (2007).

[37] Tenn. Code Ann. § 47-18-104(b) (2007).

[38] *Tucker v. Sierra Builders*, 180 S.W.3d at 114 (*citing* Tenn. Code Ann. § 47-18-115); *Myint v. Allstate Ins. Co*., 970 S.W.2d 920, 925 (Tenn. 1998); *Morris Mack Used Cars*, 824 S.W.2d 538, 540 (Tenn. 1992).

[39] Tenn. Code Ann. § 47-18-102(2); *Ganzevoort v. Russell*, 949 S.W.2d 293, 297 (Tenn. 1997); *Morris v. Mack's Used Cars*, 824 S.W.2d at 540 (*quoting Haverlah v. Memphis Aviation, Inc.*, 674 S.W.2d 297, 305 (Tenn. Ct. App. 1984).

[40] Tenn. Code Ann. § 47-18-102(4).

[41] Tenn. Code Ann. § 47-18-109.

[42] Tenn. Code Ann. §§ 47-18-106 - 47-18-108 (2007).

is a *civil* prosecution brought by the Attorney General pursuant to the latter alternative.

Tenn. Code Ann. § 47-18-115 states that the TCPA "shall be interpreted and construed consistently with the interpretations given by the federal trade commission and the federal courts pursuant to § 5(A)(1) of the Federal Trade Commission Act (15 U.S.C § 45(a)(1))." Thus, by its express mandate, resort must be had to federal law in cases construing the TCPA. The allegations in the State's Second Amended Complaint simply present nothing more than definitions of Rome's deceptive conduct in a manner consistent with FTC law. Under this statutory mandate, if Rome's argument is taken to its logical conclusion, then every state TCPA case would have to be removed to federal court because federal law would inevitably be implicated in every case.

In addition, as in the first removal, this removal attempts to use sections of the C.F.R. to describe acts or practices declared to be unfair and deceptive under those Rules as a defense to violations of State law. The only major difference between this removal and the one remanded by Judge Trauger are the section numbers of the C.F.R. mentions in the Second Amended Complaint and the fact that Rome has been added to many of the allegations.

Most importantly, federal courts which have considered similar issues have held that a complaint which pleads the FTC Holder Rule does not raise a federal question supporting removal. *See Glovier*, 452 F. Supp. 2d at 657; *Phillips* 2005 WL 1278850 at n. 3 (D. Or. 2005); *Vietnam Veterans of Am., Inc. v. Guerdon Indus., Inc.*, 644 F.Supp. 951 (D. Del. 1986). *See also* Zupanec, *supra* at 8 ("A claim implicating the Federal Trade Commission's Holder Rule does not arise under federal law for jurisdictional purposes.") Rome's

allegations to the contrary are therefor without merit and completely disregard this Court's earlier rulings.

D. Costs and Attorneys' Fees Are Warranted in this Case

The State has also moved the Court to award Plaintiff with just costs and any actual expenses, including attorneys' fees, incurred as a result of removal.[43] In its first opposition to removal, the State also sought attorneys' fees and costs, but did not argue that the defendants' removal was made in bad faith, improper purpose, frivolous, vexatious or wanton conduct (Ex.s J and K). The State merely argued that the defendants' Notice of Removal was "sufficiently weak" to support awarding costs.[44] *Id.*

Pursuant to 28 U.S.C. § 1447, the State moves this Court to require that all defendants pay its just costs and actual expenses, including attorneys' fees, incurred in having to file this second motion to remand. This second round of federal court proceedings was initiated by defendants in the face of definitive rulings by this Court explaining the interplay between federal law and the TCPA. *See Britlee,*slip op. at ____. (Ex. A.) The same issues have again been removed to this Court. In the Memorandum and Order remanding the case to state court, Judge Trauger found that compliance with the Code of Federal Regulations (specifically TILA) was a defense matter and not an element of Plaintiff's proof. (Ex. A). Further, Judge Trauger ruled that the State has concurrent jurisdiction with the federal courts over TILA and unless Congress had completely preempted the field, the incorporation of

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[43] 28 U.S.C. § 1447.
[44] *Bucary v. Rothrock,* 883 F.2d 447, 449 (6th Cir. 1989).

federal terms in state statutes does not grant original jurisdiction in federal courts. *Id.* The defendants' second removal not only ignores the Court's order, but indeed, appears to defy it.

The timing of Rome's removal also bears consideration. Rome's Notice of Removal was filed in the midst of evidentiary contempt proceeding regarding its defiance of a state court injunction. (Ex. L and N). Curiously, Rome's Notice of Removal completely omits any reference to these pending contempt proceedings. (Ex. O). Further, Rome says nothing about its failure to comply with the state court mandate requiring it to produce documents to the State by October 4, 2007 (which it did not do). (Ex. O). While standing alone, one could argue that Rome should enjoy the benefit of the doubt. When placed in context of the totality of all the facts and circumstances, however, including Rome's apparent disregard of this Court's rulings, any such benefit is quickly overshadowed by the true nature of Rome's conduct. The remaining defendants are equally culpable, in that they affirmatively supported Rome's removal of this case, and indeed, helped perfect it by agreeing to it in writing. (Ex. O). The State therefore respectfully requests that pursuant to 28 U.S.C. § 1447, this Court order Rome and all defendants to pay the State's costs and attorney fees incurred in having to file its motion to remand.

VI. CONCLUSION

Defendants have failed to carry their burden of demonstrating that this case presents a "federal question" or "arises under" the laws of the United States. Defendants' second removal of this case merely presents a variation of an argument previously considered and rejected by this Court. Defendants filed the Notice of Removal during the pendency of contempt proceedings against them, and only one day before they were ordered to produce

documents to the State in connection with these contempt proceedings. This case has been pending for over two years and was again needlessly delayed by a removal to this Court on grounds which lacked merit. For all of these reasons, this case should be immediately remanded to state court and all costs and attorney fees incurred by the State in connection with having to bring this motion to remand should be awarded to the State.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been filed electronically October 26, 2007 and served pursuant to the Rules on the United States District Court for the Middle District of Tennessee at Nashville, to:

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